Hastings Law Journal

Volume 40 | Issue 1 Article 3

1-1988

Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procuremnt Ordinances Blacklisting the Producers of Nuclear Weapons Components

Patrick J. Borchers

Paul F. Dauer

Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components

by
PATRICK J. BORCHERS*
and PAUL F. DAUER**

Socially motivated government procurement philosophies continue to thrive and proliferate.[1] The social policy veneer on public contracting strains sound procurement practice and often conflicts with core concepts of public stewardship, fiscal accountability, and procurement practice. Not surprisingly, these forays into the regulation of government purchasing also produce statutory and constitutional tensions. This Article examines the newest species of this genus: procurement blacklisting of vendors who manufacture or sell components used in nuclear weapons systems.

---

* Associate, Downey, Brand, Seymour & Rohwer. J.D. 1986, University of California, Davis; B.S. 1983, University of Notre Dame.

** Faculty Member, McGeorge Law School; Partner, Downey, Brand, Seymour & Rohwer. J.D. 1965, University of Michigan; B.A. 1962, University of California, Santa Barbara.

The authors wish to thank Sherry Lynn Jacobs, William Kealey, and James Hutton for their assistance. The authors also wish to thank Tom Ross and Judy Borchers for their helpful comments on an earlier draft.

1. The implementation of socio-economic programs through the procurement process is not new. *See* 1 COMMISSION ON GOVERNMENT PROCUREMENT, REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 111-24 (1972). That report identified thirty-nine principal socio-economic programs then applicable to federal procurement. *Id.* at 114-15. Current congressional activity evidences continued viability of such programs. *See* Kennedy, *Current Developments in Socioeconomic Issues in Government Contracting,* 23 PUBLIC CONTRACT NEWSLETTER 3 (Spring 1988). Many of those programs find their counterparts in state and local procurement, ranging from Buy-American provisions to prohibitions on contracting with violators of environmental regulations. Some local governments have expanded socio-economic intrusions into the procurement process, such as prohibitions on contracting with companies investing in South Africa. *See infra* notes 191-216 and accompanying text.

Ordinances establishing nuclear free zones are of recent origin and are multiplying. As of June 1988, over 150 local jurisdictions in the United States had adopted some type of nuclear free zone law.[2] These ordinances are often a creature of the initiative process or some other form of direct democracy.[3] The generic term, "nuclear free zone," however, masks a welter of differences. Most nuclear free zone ordinances are largely symbolic gestures without any discernible impact on the daily activities of the citizenry or the governmental entity enacting the ordinance.[4] Recently, however, a different type of ordinance has emerged. These "second generation" or "new breed" nuclear free zone ordinances have several provisions designed to have a practical impact.

Although the new breed ordinances differ among themselves in some respects, the common feature, which this Article will examine, is their prohibition on all contracts between the governmental body and a vendor that produces components used in nuclear weapons. Marin County, California has adopted an ordinance typical of the new breed; it prohibits the county from "mak[ing] any contract with, or investments in, any nuclear weapons contractor."[5] "Nuclear weapons contractor" encompasses "any person, corporation, or other business entity, which knowingly or intentionally is engaged in the research, development, production, or testing of nuclear warheads, nuclear weapons systems, or nuclear weapons components."[6] The ordinance defines "nuclear weapon" to include the explosive component of any device, as well as triggering, guidance, and propulsion components.[7] Marin County's blacklist of forbidden contractors includes Ford Motor Company, Motorola, IBM, Westinghouse, General Electric, Sylvania, RCA, GTE, and General Motors.[8]

While not as common as their more conventional and symbolic counterparts, new breed nuclear free zone ordinances continue to grow in number and significance. As of October 1987, seven communities had

2. The New Abolitionist, June 1988, at 2, col. 1 (newsletter of Nuclear Free America, an international clearinghouse and resource center advocating abolition of nuclear weapons) (on file at *The Hastings Law Journal*).

3. *Id.*

4. *Id.*

5. MARIN COUNTY, CAL., CODE ch. 23.12g § IV(C) (1988).

6. *Id.* ch. 23.12, § III(E). Marin County enacted a supplemental ordinance extending the reach of the ordinance to distributors and retailers of manufacturers of nuclear weapons components. *See id.* ch. 23.13.

7. *Id.* ch. 23.12, § III(A).

8. *See* Minutes of the Marin County Peace Conversion Commission Meeting (Jan. 25, 1988) (on file at *The Hastings Law Journal*).

adopted new breed ordinances:[9] Arcata, California;[10] Berkeley, California;[11] Hayward, California;[12] Hoboken, New Jersey;[13] Jersey City, New Jersey;[14] Hood River County, Oregon;[15] and Takoma Park, Maryland,[16] whose ordinance, adopted on December 12, 1983, was the first of the new breed.[17] Additionally, Amherst, Massachusetts approved a new breed ordinance in 1984, but the Massachusetts Attorney General voided the law as unconstitutional in a brief letter ruling.[18]

Other communities, including Davis, California and Oakland, California, are considering new breed ordinances.[19] With this increasing presence, it becomes more likely that these ordinances will be subject to judicial review.

---

9. *See generally* The New Abolitionist, June 1988, at 14 (compiling ordinances). Additionally, other jurisdictions have ordinances that might be termed "new breed," but do not include the prohibition on contracts with nuclear weapons producers. *See, e.g.*, CHICO, CAL., MUNICIPAL CODE, ch. 9.60 (1988); CHICAGO, ILL., MUNICIPAL CODE, ch. 202 (1986); CHAPEL HILL, N.C., CODE OF ORDINANCES, art. XI, § 11 (1988); Eugene, Or., The Nuclear Free Eugene Act (Nov. 4, 1986) (amended by Eugene, Or., Ordinance 19449 (Feb. 25, 1987) and repealed by Eugene, Or., Ordinance 19565 (June 27, 1987)).

10. Arcata, Cal., Ordinance 1092 (Nov. 5, 1986) (known as the "Arcata Nuclear Weapons Free Zone Ordinance") (on file at *The Hastings Law Journal*). Arcata's ordinance seeks to eliminate contracts with nuclear weapons producers "as much as possible under current state and federal law." *Id.* § 5(B). As a practical matter, however, this savings clause has no effect. As this Article demonstrates, the contractor's status as a nuclear weapons producer cannot influence contracting decisions. Therefore, local governments cannot select against producers of nuclear weapons components in any fashion and still act within the bounds of "current state and federal law."

11. BERKELEY, CAL., ORDINANCES, ch. 12.90 (1986) (known as "The Nuclear Free Berkeley Act").

12. Hayward, Cal., Ordinance 87-024 (Sept. 15, 1987) (known as "An Ordinance Establishing a Nuclear Free Hayward") (on file at *The Hastings Law Journal*).

13. Hoboken, N.J., Ordinance C-310 (Sept. 19, 1984) (known as "The Nuclear-Free Hoboken Ordinance") (on file at *The Hastings Law Journal*).

14. Jersey City, N.J., Ordinance C-30 (Sept. 12, 1985) (known as "An Ordinance Establishing Jersey City as a Nuclear-Free Zone") (on file at *The Hastings Law Journal*).

15. Hood River County, Or., Ordinance 159 (Nov. 17, 1986) (known as the "Nuclear Free Hood River County Ordinance") (on file at *The Hastings Law Journal*).

16. TAKOMA PARK, MD., CODE §§ 8A-1 to -12 (1985) (on file at *The Hastings Law Journal*).

17. The New Abolitionist, June 1988, at 14.

18. Amherst, Mass., Warrant of the Amherst Annual Town Meeting, art. 65 (Apr. 30, 1984), *disapproved in* Letter from The Massachusetts Dept. of the Attorney General to Amherst Town Clerk (Sept. 6, 1984) (copy on file at *The Hastings Law Journal*).

19. The Davis ordinance was placed before the City Council upon approval by the Davis Peace and Justice Commission. The Davis City Council has asked the Peace and Justice Commission to do further work on the ordinance. *See* The Davis Enterprise, Apr. 21, 1988, at A1, col. 5. Oakland's ordinance is set for election in November of 1988. (Copies of both draft ordinances on file at *The Hastings Law Journal*).

The new breed ordinances reflect strong disagreements with national nuclear weapons policy. Many of the communities enacting new breed ordinances have a tradition of progressive local politics, including open disagreements with the federal government on matters of national and international importance.[20] The political strategy underlying the ordinances apparently is to begin on a small scale and work toward broader results. This strategy is encapsulated neatly in the nuclear free zone movement's now-familiar slogan, which implores citizens to "think globally, act locally."[21]

The purpose of this Article is neither to resolve the debate between these local jurisdictions and the federal government over the wisdom of United States nuclear policy nor to critique the political strategy of the nuclear free zone movement. Rather, the purpose of the Article is to evaluate the legality of the ordinances' noncontracting provisions in light of the important legal doctrines relating to competitive bidding and the division of authority between the federal government and state and local governments.

This Article examines three significant obstacles to the enforcement of the noncontracting provisions of new breed ordinances.[22] Part I evaluates the conflict between noncontracting provisions and state procurement laws requiring local governments to award contracts to the lowest responsible bidder. Focusing on California, the state with the most new breed ordinances,[23] part I concludes that the contracting prohibitions violate these state procurement statutes. Part II discusses the noncontracting provisions in relation to the federal Atomic Energy Act of 1954[24] and

20. *See, e.g.,* The Davis Enterprise, Apr. 21, 1988, at A1, col. 5 (discussing desire of Davis City Council to effect the maximum possible change in United States nuclear policy).

21. Rand, *Why Should We Invite a Military Ship to Santa Cruz?,* The New Abolitionist, Oct. 1987, at 5.

22. This is not to suggest that these obstacles are necessarily exhaustive of possible legal challenges to the noncontracting provisions. In addition to the issues addressed in this Article, lawyers have identified potential issues in several aspects of different ordinances, including violations of state statutes, preemption under various federal statutes, and violations of the commerce clause and the first amendment. *See* NUCLEAR FREE AMERICA, NUCLEAR FREE ZONES AND THE LAW (undated) (pamphlet compiling opinion letters from individual government attorneys, private attorneys, and others) (on file at *The Hastings Law Journal*); *see also* Weaver, Clayton, Roche, Krause, Lloyd & Bamonte, *The Legality of the Chicago Nuclear Weapon Free Zone Ordinance,* 17 LOY. U. CHI. L.J. 553, 554, 557-63, 571-77 (1986) (discussing the Chicago ordinance, which does not include a contracting prohibition) [hereinafter Weaver].

23. The New Abolitionist, Oct. 1987, at 10, col. 1. Other states with such ordinances, including Oregon and Massachusetts, impose similar requirements on local governments. *See infra* notes 77-79 and accompanying text.

24. 42 U.S.C. §§ 2011-2296 (1982).

concludes that the Act occupies the field regulating nuclear power and weapons production and therefore preempts the provisions. Part III considers whether the contracting prohibitions intrude on the federal military and foreign relations powers; it concludes the ordinances do intrude on these constitutionally granted powers of the federal government and are therefore unconstitutional. Thus, the noncontracting provisions of the second generation ordinances are legally invalid in at least three important respects.

I. Conflict with State Procurement Laws

Government procurement is most commonly conducted through competitive bidding,[25] which requires a governmental entity to contract with "the lowest responsible bidder."[26] Although not all states impose a "lowest responsible bidder" standard on contracting conducted by local governments,[27] California imposes this requirement on local governmental entities by statute.[28]

The noncontracting provisions of the new breed ordinances forbid local governments from contracting with producers of nuclear weapons components.[29] When a producer of nuclear weapons components sub-

25. P. DAUER, A DESKBOOK OF PUBLIC CONTRACT LAW 90 (1977). The discussion of the conflict between the nuclear contractor prohibitions and the competitive bidding methodology is applicable to other procurement methodologies that incorporate statutory restrictions on the entity's mode of contracting or selecting its contractors. For instance, some jurisdictions have specific statutes that accord preferences to small businesses, *see, e.g.*, CAL. GOV'T CODE §§ 14835, 14838(b) (West Supp. 1987); to in-state or local businesses, *see, e.g.*, CAL. PUB. UTIL. CODE §§ 14837(c), 14838(b) (West Supp. 1987); SAN FRANCISCO, CAL., ADMINISTRATIVE CODE § 12D.8(B)(3); and to women-owned businesses, *see, e.g.*, CAL. PUB. UTIL. CODE § 8281 (West Supp. 1988).

Ordinarily, however, the conflict inherent in a traditional competitive bidding context is not present in negotiated procurements. In such methodologies, the procuring agency usually has the discretion to specify the criteria for contractor selection. Thus, a criterion unrelated to the contractor's ability to perform could be incorporated in the solicitation documents, although in the instance of prohibitions on contracting with nuclear weapons producers such a criterion would contravene constitutional principles. *See infra* notes 81-216 and accompanying text.

26. *See, e.g.*, CAL. PUB. CONT. CODE § 20128 (West 1985).

27. *See, e.g.*, MD. STATE FIN. & PROC. CODE ANN. § 11-202(b)(4) (1985).

28. CAL. PUB. CONT. CODE. § 20128 (West 1985) (applying requirement to counties); CAL. PUB. CONT. CODE § 20162 (West 1985) (applying requirement to cities); *see, e.g.*, M.G.M. Constr. Co. v. County of Alameda, 615 F. Supp. 149, 150 (N.D. Cal. 1985) (citing CAL. PUB. CONT. CODE § 20128 (West 1985)). Charters of local jurisdictions also impose such a requirement. *See, e.g.*, SAN FRANCISCO, CAL., CHARTER § 7200 (1986); BERKELEY, CAL., CHARTER, art. XI, § 65-67 (1977).

29. Some of the ordinances contain provisions for a waiver if no reasonable alternatives exist. *See, e.g.*, TAKOMA PARK, MD., CODE § 8A-6(f) (1985); Proposed Davis, Cal., Nuclear Free Zone Ordinance § 16C-13(f) (on file at *The Hastings Law Journal*). If alternative con-

mits the low bid, however, enforcement of the ordinance can violate the statutory requirement that the local government award the contract to the "lowest responsible bidder."[30] The resolution of this conflict depends upon the interpretation of the phrase "responsible bidder."

The California Supreme Court has had only one occasion to construe this term.[31] In *City of Inglewood-L.A. County Civic Center Authority v. Superior Court,*[32] the court considered a disappointed bidder's challenge to a civic authority's award of a construction contract. The civic authority had conducted an extensive review of the bidders and bids.[33] The disappointed bidder had submitted the lowest monetary bid and achieved minimum, or higher, scores on each of several tests designed to evaluate the bidder's ability to perform the contract.[34]

The shunned bidder contended that the award violated the statutory mandate that a civic authority contract with the lowest responsible bidder.[35] The civic authority, pointing out that the chosen bidder had scored significantly higher in the responsibility rating process, argued that the award was proper because the second lowest bidder was "considered to be so superior as to justify its selection as the lowest responsible bidder."[36] The court sided with the rejected bidder, explaining that "responsibility" in the public contract context refers "to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work."[37] The court concluded that the civic authority's judgment of "relative superiority" was inappropriate[38] and that because the low bidder was responsible, awarding the contract to the other bidder violated the statute.[39]

---

tractors are available, the ordinances with waiver provisions prevent nuclear weapons contractors from obtaining contracts. Thus, in those instances, the analysis developed in this section is not altered.

30. CAL. PUB. CONT. CODE §§ 20128, 20162 (West 1985).

31. *See* City of Inglewood-L.A. Civic Center Auth. v. Superior Ct., 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (1972). California courts of appeal have interpreted the term, however, invariably relying on *City of Inglewood. See, e.g.,* Taylor Bus Serv., Inc. v. San Diego Bd. of Educ., 195 Cal. App. 3d 1331, 1341 n.4, 241 Cal. Rptr. 379, 385 n.4 (1987); R & A Vending Serv., Inc. v. City of Los Angeles, 172 Cal. App. 3d 1188, 1193, 218 Cal. Rptr. 667, 669 (1985).

32. 7 Cal. 3d at 864, 500 P.2d at 603, 103 Cal. Rptr. at 690.

33. *Id.* at 868, 500 P.2d at 605, 103 Cal. Rptr. at 693.

34. *Id.* at 868-69, 500 P.2d at 605-06, 103 Cal. Rptr. at 693-94.

35. *Id.* at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692 (citing CAL. GOV'T CODE § 25454 (current version at CAL. PUB. CONT. CODE § 20128 (West 1985))).

36. *Id.* at 869, 500 P.2d at 606, 103 Cal. Rptr. at 694.

37. *Id.* at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692.

38. *Id.*, 500 P.2d at 605, 103 Cal. Rptr. at 693.

39. *Id.* at 870, 500 P.2d at 606-07, 103 Cal. Rptr. at 694-95.

The California Supreme Court thus interpreted responsibility as a threshold concept. If the low monetary bidder bids to specifications and meets the minimum criteria for responsibility, any award made must go to it. Further, *City of Inglewood* held that the only relevant factor in determining responsibility is the bidder's ability "to do the particular work under consideration."[40]

This interpretation of responsibility presents a significant obstacle to the contracting prohibition feature of the ordinances. The survival of these provisions depends upon an expanded definition of the term "responsibility." Under the ordinances, a producer of a nuclear weapons component may not receive a public contract in the governed jurisdiction, regardless of its ability to perform the contract. In order for the noncontracting provisions to pass muster, therefore, local governments would need to have discretion to interpret responsibility to include the local government's concept of *social* responsibility.[41] By defining responsibility in terms of performance ability, *City of Inglewood* impliedly rejected this interpretation.

Although no California state court case has squarely faced the issue of interpreting "responsibility," several federal cases, applying California law, have explored the question. In *Associated General Contractors of California v. San Francisco Unified School District,*[42] the plaintiff challenged a policy of the San Francisco Board of Education that allowed the award of construction contracts only if the general contractor (a) was a minority business enterprise, or (b) promised that one-fourth of the subcontractors it employed would be minority owned. Relying on *City of Inglewood,* the Ninth Circuit held that the plan violated a California statute requiring school districts to contract with the lowest responsible bidder.[43] The court reasoned that, because *City of Inglewood*'s interpretation of responsibility turned only on performance ability, the Board's plan violated the statute by foreclosing the award of contracts to

40. *Id.* at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692. Until recently, the California Assembly was considering Assembly Bill 1160, 1987-88 Leg., Reg. Sess., which would alter slightly the definition of responsibility in public works contracts. *See* Ferber, *AB 1160: Who is the "Lowest Responsible Bidder?,"* PUBLIC LAW NEWS 2 (Winter 1987). That bill provided that responsibility is " 'the quality, fitness, capacity, integrity, and other attributes of responsibility to perform the particular requirements of the public works contract.' " *Id.* at 9 (quoting Assembly Bill 1160). Although the precise intended effect of the bill was unclear, it expressly maintained the link between responsibility and capacity to perform recognized in *City of Inglewood. Id.* The "Lowest Responsible Bidder" provision of Assembly Bill 1160 has died, but its substance has been resurrected in Assembly Bill 3045, 1987-88 Leg., Reg. Sess..

41. *See supra* notes 25, 35-39 and accompanying text.

42. 616 F.2d 1381, 1384 (9th Cir.), *cert. denied,* 449 U.S. 1061 (1980).

43. *Id.* at 1385.

bidders able to perform.[44] The court noted that it would not "deny that under California law a school district could require a bidder to agree not to violate anti-discrimination laws."[45] The Ninth Circuit panel concluded, however, that the failure of a bidder to accede to the entity's views on a "controversial social question" was not a proper basis on which to exclude a bidder. Consequently, the court struck down the requirement.[46]

The Ninth Circuit adhered to this reasoning in *Associated General Contractors of California, Inc. v. City and County of San Francisco.*[47] In *City of San Francisco,* the city passed an ordinance giving five percent bidding preferences to locally owned, minority-owned, and women-owned business enterprises.[48] The San Francisco city charter, however, required that contracts over $50,000 be awarded to "the lowest reliable and responsible bidder."[49]

As it had done in *San Francisco Unified School District,* the Ninth Circuit relied upon *City of Inglewood* to find that responsibility depended only upon ability to perform the contract.[50] The San Francisco plan, however, would have awarded contracts to a bidder other than the lowest bidder able to perform in cases in which the low bidder did not qualify for a preference and did not bid more than five percent lower than all preferred contractors.[51] The court therefore concluded that the plan

44. *Id.*

45. *Id.* at 1385 n.4. In M.G.M. Constr. Co. v. Alameda County, 615 F. Supp. 149, 150-51 (N.D. Cal. 1985), the district court struck down a similar plan imposed by a county. The *M.G.M.* court relied on *City of Inglewood,* which also interpreted CAL GOV'T CODE § 25454 (West 1968) (current version at CAL. PUB. CONT. CODE § 20128 (West 1985)). *M.G.M.,* 615 F. Supp. at 150-51; *see City of Inglewood,* 7 Cal. 3d 861, 867, 500 P.2d 601, 604, 103 Cal. Rptr. 689, 692 (1972). Thus *M.G.M.* is consistent with *San Francisco Unified* in treating "lowest responsible bidder" as meaning the same thing in different statutes. The *M.G.M.* court confounds the issue, however, by noting without discussion, but in contradistinction to *City of Inglewood* and *City of San Francisco,* that "to the extent the County's affirmative action program purports to authorize the rejection of low bids on the basis of the bidder's failure to comply with the ten percent goal for minority subcontractor participation, the program is illegal under California Public Contract Code section 20128." *M.G.M.,* 615 F. Supp. at 151. This statement is consistent only with a tacit recognition that even if treated as an element of bid responsiveness, in contrast to bidder responsibility, the affirmative action requirement is in fatal conflict with the statutory standard of award. See *infra* notes 59-74 and accompanying text for a discussion of bidder responsibility and bid responsiveness in this context.

46. 616 F.2d at 1385 n.4 (citing 57 Op. Cal. Att'y Gen. 574 (1974))

47. 813 F.2d 922 (9th Cir. 1987).

48. *Id.* at 924.

49. *Id.* at 925 (quoting SAN FRANCISCO, CAL., CHARTER § 7.200 (1986)).

50. *Id.*

51. *Id.*

violated the charter by considering criteria other than the bidder's ability to do the work under consideration.[52]

As the *City of San Francisco* court noted, authorities from states other than California are not unanimous on the issue. In *Southwest Washington National Electrical Contractors Association v. Pierce County,*[53] the Washington Supreme Court considered a county requirement that a contractor employ twelve percent or more women- or minority-owned businesses as subcontractors, or show that compliance with this requirement was impracticable. The Washington court interpreted responsibility to include a component of social responsibility.[54] Reasoning that a contractor that does not meet affirmative action goals is socially irresponsible, the court upheld the plan.[55]

Absent legislative action, a California state court could not approve the contracting prohibitions in new breed ordinances without repudiating *San Francisco Unified School District* and *City of San Francisco.*[56] Both cases reject the expansive view of responsibility necessary to uphold the validity of the provisions. While federal court interpretations of state law do not bind state courts,[57] at least three factors make it unlikely that a California court, or a court following California's generally restrictive view of responsibility, would approve the contracting prohibitions in the face of a lowest responsible bidder requirement.

52. *Id.* at 926 n.7, 927. The court also concluded that portions of the plan were unconstitutional under the equal protection clause of the fourteenth amendment. *Id.* at 928-44. *See generally* Days, *Fullilove,* 96 YALE L.J. 453 (1987) (discussing the constitutional implications of affirmative action plans in government contracts); *Affirmative Action in Local Public Procurement,* 44 FEDERAL CONTRACTS REPORTS 1108 (1985) (presenting a framework for analyzing government contract affirmative action plans in relation to competitive bidding laws and the equal protection clause).

53. 100 Wash. 2d 109, 115, 667 P.2d 1092, 1094 (1983).

54. *Id.,* 667 P.2d at 1095-96.

55. *Id.* In a case relied upon by *Southwest Washington,* the Illinois Supreme Court approved a nearly identical plan with similar reasoning. *See* S.N. Nielson Co. v. Public Bldg. Comm'n, 81 Ill. 2d 290, 299, 410 N.E.2d 40, 44 (1980).

56. California Public Contract Code § 2000, enacted in response to M.G.M. Constr. Co. v. Alameda County, 615 F. Supp. 149 (N.D. Cal. 1985), authorizes local agencies to consider compliance with affirmative action requirements in awarding public contracts, notwithstanding any provision of law requiring an award to the lowest responsible bidder. Such a legislative response, however, merely emphasizes that responsibility is a concept that requires legislative action to alter. *See generally* Harris, *"Good Faith Efforts" as an Element of Bidder Responsibility—California's Legislative Response,* in PUBLIC WORKS CONTRACTS, LOCAL, STATE, FEDERAL PROTESTS . . . AND FINANCING . . . AND AFFIRMATIVE ACTION (American Bar Association 1988) (discussing legislature's addition to list of elements of bidder responsibility "good faith efforts" by bidder to meet minority- or women-owned business participation goals of local agencies).

57. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 370-77 (4th ed. 1983).

First, the federal courts' interpretation of *City of Inglewood* remains compelling, and the concept of responsibility espoused by the *City of Inglewood* court is fundamentally at odds with the more amorphous concept needed to validate the new breed ordinances.[58] *City of Inglewood* viewed the responsibility requirement simply as a screening device to eliminate bidders unable to perform. An interpretation of responsibility that allows public contract statutes to promote particular views of social policy goes well beyond the implicit, if not explicit, limits of *City of Inglewood*.

Second, even decisions such as *Southwest Washington* do not go far enough to validate the noncontracting provisions of the new breed ordinances. The plan approved in *Southwest Washington* did not require the bidder to possess any particular quality, only that it promise in the bid to meet affirmative action goals in hiring subcontractors.[59] Although the *Southwest Washington* court treated the question of whether such a plan complied with state law as an issue of bidder responsibility,[60] that case also involved elements of bid *responsiveness*. Responsibility focuses on the qualities of the *bidder*.[61] Responsiveness, on the other hand, focuses on the qualities of the *bid*.[62] A bid is responsive only if it conforms substantially to the specifications set by the contracting entity; the bidder itself is not a factor.[63]

The issue in *Southwest Washington*, therefore, might be recast as a question of bid responsiveness. The requirement of hiring minority sub-

58. As the *City of San Francisco* court observed, the *City of Inglewood* definition of responsibility is

> a concept capable of relatively precise definition and objective application. Notions of social responsibility, commendable as they may be, are of a wholly different character. One person's social responsibility is another's officious intermeddling. The district court's approach removes an objective standard from the charter and substitutes for it a concept so nebulous that it removes any meaningful constraint on the Board's actions.

Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 926 n.7 (9th Cir. 1987). Echoing this theme, the court noted that "fairness means different things to different people, many of them inconsistent with the requirement that contracts be awarded to the 'lowest reliable and responsible bidder.' " *Id.* at 926 n.8.

59. Southwest Wash. Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wash. 2d 109, 111-12, 667 P.2d 1092, 1094 (1983); *see supra* notes 53-55 and accompanying text.

60. 100 Wash. 2d at 114-17, 667 P.2d at 1095-96; *see supra* notes 53-55 and accompanying text.

61. *See supra* notes 37-52 and accompanying text.

62. *See, e.g.*, National Coach Corp. v. State Bd. of Control, 137 Cal. App. 3d 750, 753-57, 187 Cal. Rptr. 261, 262-65 (1982); *see also* P. SHNITZER, GOVERNMENT CONTRACT BIDDING 13-1 to -24 (3d ed. 1987).

63. *See, e.g.*, Taylor Bus Serv. Inc. v. San Diego Bd. of Educ., 195 Cal. App. 3d 1331, 1341-43, 241 Cal. Rptr. 379, 385-86 (1987); 47 Op. Cal. Att'y Gen. 129 (1966).

contractors could be understood as analogous to a requirement that a bidder use certain construction materials or otherwise conform to specifications, which is undeniably a matter of bid responsiveness.[64] So understood, the holding in *Southwest Washington* would not depend upon an expanded definition of responsibility; rather, it could be explained on the less controversial grounds that local governments may require contractors to submit bids that are *responsive* to affirmative action goals.[65]

Two federal cases interpreting California law, *Associated General Contractors of California v. San Francisco Unified School District*[66] and *M.G.M. Construction Co. v. County of Alameda,*[67] considered plans that, like the plan in *Southwest Washington,* required contractors to meet affirmative action goals in hiring subcontractors.[68] Like *Southwest Washington,* these cases treated the issue as one of bidder responsibility; unlike *Southwest Washington,* these cases concluded that such plans are inconsistent with the concept of responsibility.[69] Thus, these federal cases implicitly reject the inference, which might be drawn from *Southwest Washington,* that the concept of bid responsiveness can be a vehicle to promote social goals.

Even if bid responsiveness can accommodate social goals under some circumstances, however, new breed ordinances still could not survive a state law challenge. Unlike the affirmative action plans at issue in *Southwest Washington, San Francisco Unified School District,* and *M.G.M.,* the noncontracting provisions of the new breed ordinances cannot be recast as a matter of bid responsiveness. The ordinances' selection scheme focuses entirely on a quality of the bidder. A producer of nuclear weapons components cannot overcome the prohibition on selection through any method of bid performance, such as hiring certain classes of subcontractors. A nuclear weapons producer cannot contract regardless of how the bidder promises to perform. Further, *M.G.M.* and *San Francisco Unified School District,* by focusing exclusively on responsibility,

64. *See, e.g., National Coach Corp.,* 137 Cal. App. 3d at 753-57, 187 Cal. Rptr. at 262-65. At least one district court has recognized that requirements that general contractors employ minority-owned subcontractors reasonably can be construed as a matter of bid responsiveness. *See* Gilbert Cent. Corp. v. Kemp, 637 F. Supp. 843, 848-49 (D. Kan. 1986).

65. The Illinois Supreme Court, in S.N. Nielson Co. v. Public Bldg. Comm'n, 81 Ill. 2d 290, 296-301, 410 N.E. 2d 40, 43-45 (1980), also treated a requirement that a general contractor meet affirmative action goals as an issue of responsibility.

66. 616 F.2d 1381 (9th Cir. 1980).

67. 615 F. Supp. 149 (N.D. Cal. 1985).

68. *See* Southwest Wash. Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wash. 2d 109, 115, 667 P.2d 1092, 1096 (1983).

69. *San Francisco Unified,* 616 F.2d at 1385; *M.G.M.,* 615 F. Supp. at 150.

reject any implication that recasting the issue as one of responsiveness can circumvent the responsibility requirement.

In *City of San Francisco,* the Ninth Circuit implicitly recognized this distinction between responsibility and responsiveness.[70] The court noted that validating an ordinance like the one at issue in *City of San Francisco*[71] would expand the concept of responsibility.[72] Both the ordinance in *City of San Francisco* and new breed ordinances depend entirely on the *bidder,* not the *bid.* As the *City of San Francisco* court noted, *Southwest Washington* did not go so far as to hold that an ordinance focusing exclusively on a quality of the bidder was permissible,[73] and the only reported decision approving such an ordinance was the opinion of the district court below in *City of San Francisco.*[74] Validation of the noncontracting provisions of new breed ordinances would require a court to embrace the repudiated view of the district court in *City of San Francisco* and thus to go beyond the bounds of any reported decision retaining its persuasive force.

Third, even assuming that a responsibility determination could permit preferences to bidders based on racial and gender criteria, it does not necessarily follow that the criteria imposed by the new breed ordinances are appropriate. Congress has implemented affirmative action goals through federal procurement legislation.[75] Affirmative action preferences at the local level are fully consonant with this established national policy.[76] No analogous statement of national policy opposing nuclear weapons exists; on the contrary, the federal government is the primary source of funding for nuclear facilities, including those developing weapons. A definition of responsibility encompassing a policy of opposition to nuclear weapons therefore would lack the foundation in national policy enjoyed by affirmative action plans. Thus, allowing a local government to impose its vision of nuclear responsibility on prospective contractors

70. *City of San Francisco,* 813 F.2d at 926 (responsibility is bidder's willingness and ability to comply with standards; bidder's responsiveness must be considered as part of his responsibility).

71. *See supra* notes 47-52 and accompanying text.

72. *City of San Francisco,* 813 F.2d at 926.

73. *Id.* at 926-27 (citing *Southwest Washington,* 100 Wash. 2d at 112, 667 P.2d at 1094).

74. *See* Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 619 F. Supp. 334, 344 (N.D. Cal. 1985), *aff'd in part and rev'd in part,* 813 F.2d 922 (9th Cir. 1987).

75. *See* Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (federal statute requiring ten percent of federally funded public works contracts be awarded to minority owned businesses is constitutional); Office of Management and Budget, Circular A-102, at Attachment O (mandating the inclusion of affirmative action in the minimum acceptable procurement standards applicable to state and local government expenditures of federal grant funds).

76. *See infra* notes 81-166 and accompanying text.

would stretch the concept of responsibility much further than would an affirmative action plan like the one struck down in *City of San Francisco*.

Similar statutes in other states with new breed ordinances present the same obstacle. Like California, Oregon requires that local governments contract with the lowest responsible bidder.[77] The Oregon statutes foreclose a broad reading of responsibility: a bidder is irresponsible only if it lacks the financial ability, equipment, or key personnel to perform the contract, or has "repeatedly breached contractual obligations to public and private contracting agencies."[78] Massachusetts also imposes a lowest responsible bidder requirement on local governments.[79]

Thus, state procurement laws mandating the award of local government contracts to the lowest responsible bidder are serious obstacles to the vitality of the noncontracting provisions. Ultimately, however, this may prove to be the least compelling objection to the ordinances. State statutes may be amended with sufficient support in state legislatures. California, for instance, has amended its statutes governing some public contracts to allow for specified types of preferences.[80] New breed ordinances conceivably could achieve sufficient political popularity to convince state legislatures to remove all state law roadblocks to their enforcement. Political resolution of the legal objections raised in the following sections, however, would require congressional action and a constitutional amendment.

77. OR. REV. STAT. § 279.055 (1987) (local governments must review contracts in same fashion as the state); *id.* § 279.029 (public contracting agencies must award to the "lowest responsible bidder").

78. *Id.* § 279.037; *see also* Hanson v. Mosser, 247 Or. 1, 9, 427 P.2d 97, 100-01 (1967) (interpreting previous statutory scheme).

79. Mass. Gen. Law Ann., ch. 149, § 44A (West 1982 & Supp. 1988) (public contracts must be awarded to lowest responsible bidder); *id.* ch. 40, § 5B (West 1985 & Supp. 1985); *id.* ch. 44, §§ 54-55A (West 1968 & Supp. 1988) (investment of trust funds; public funds on deposit) (regulating municipal contracts); *id.* ch. 164, § 57 (West 1976 & Supp. 1988) (regulating municipal contracts); *see also* Letter from Massachusetts Dept. of The Attorney General to Amherst Town Clerk at 3-4 n.1 (Sept. 6, 1984) (on file at *The Hastings Law Journal*) (concluding that Amherst's nuclear free zone ordinance may conflict with lowest responsible bidder statutes). Massachusetts case law makes clear, however, that the responsibility requirement is not implied absent a statute. *See, e.g.,* Datrol, Inc. v. State Purchasing Agent, 379 Mass. 679, 698 n.15, 400 N.E.2d 1218, 1229 n.15 (1980); Archambault v. Mayor of Lowell, 278 Mass. 327, 332, 180 N.E. 157, 159 (1932); Larkin v. County Comm'rs of Middlesex, 274 Mass. 437, 439, 174 N.E. 684, 689 (1931). In contrast Maryland, home of the Takoma Park ordinance, apparently does not impose a lowest responsible bidder requirement on local governments. MD. STATE FIN. & PROC. CODE ANN. § 11-202(b)(3) (1985) (exempting Maryland local governments from the statutory provisions requiring the award of contracts to lowest responsible bidders).

80. *See, e.g.,* CAL. PUB. CONT. CODE § 20229 (West 1985) (gives preferences by setting percentage goals for nonfederally funded contracts that correspond with such goals in federally funded contracts); *id.* § 2000 (permits preferences for women or minority-owned businesses).

II. Preemption Under the Atomic Energy Act

A. Preemption of Nuclear Power Regulation Generally

The United States Supreme Court has examined the preemptive effect of the federal Atomic Energy Act of 1954 (AEA)[81] on local and state laws three times in the last two decades.[82] The AEA, like all other federal laws, draws its preemptive force from the Constitution's supremacy clause, which provides that federal laws "shall be the Supreme Law of the land."[83] This elementary principle, however, spawns a multitude of complexities in application to a particular federal statutory scheme,[84] and the AEA is no exception.

For more than a decade, *Northern States Power Co. v. Minnesota*[85] stood as the leading case on the preemptive effect of the AEA. In *Northern States,* the Eighth Circuit held that the AEA preempted a Minnesota law regulating radioactive emissions of nuclear power plants more strictly than federal laws. The court noted that the AEA is a complex and pervasive scheme, empowering the Atomic Energy Commission (now the Nuclear Regulatory Commission) to license nuclear power plants for operation only upon a determination that the plants will meet

81. 42 U.S.C. §§ 2011-2296 (1982).

82. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983); Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.,* 405 U.S. 1035 (1972).

The preemptive effect of federal law is identical on both state laws and laws of governmental agencies that draw their authority from states, such as cities and counties. *See, e.g.,* Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103, 1110-12 (3d Cir. 1985), *cert. denied,* 475 U.S. 1013 (1986) (applying cases preempting state laws to a local ordinance); Citizens for Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp. 1084, 1093-96 (E.D.N.Y. 1985) (same); United States v. City of N.Y., 463 F. Supp. 604, 607-08 (S.D.N.Y. 1978) (same).

83. U.S. CONST. art. VI, cl. 2.

84. *See, e.g.,* Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987) (preemption under Employees' Retirement Income and Security Act, 29 U.S.C. §§ 1001-1461(1982 & Supp. 1986)); Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) (preemption under section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. §§ 141-187 (1982 & Supp. 1986)). *See generally* Rothschild, *A Proposed "Tonic" with Florida Lime to Celebrate our New Federalism: How to Deal with the "Headache" of Preemption,* 38 U. MIAMI L. REV. 829 (1984) (discussing and criticizing various facets of the preemption doctrine).

85. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.,* 405 U.S. 1035 (1972). Summary affirmances of lower court opinions are "not to be read as an adoption of the reasoning supporting the judgment under review." Zobel v. Williams, 457 U.S. 55, 64 n.13 (1982). Nonetheless, a summary affirmance does affirm the judgment and thus is more significant than an action that simply does not disturb the judgment of the lower court, such as denial of review. Therefore, lower courts have treated *Northern States* as a leading case, with at least one placing heavy reliance on the Supreme Court's summary affirmance. *See* Commonwealth Edison Co. v. Pollution Control Bd., 5 Ill. App. 3d 800, 801, 284 N.E.2d 342, 342-43 (1972).

specified safety standards.[86] In arguing against preemption of its emission control law, Minnesota placed primary reliance on section 274(k) of the AEA,[87] which provides in pertinent part that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[88] Minnesota contended that this section evidenced a congressional intent to allow concurrent state and federal nuclear safety regulation.[89]

The Eighth Circuit disagreed. It noted that even though the AEA did not contain an express provision preempting state laws, the Act was sufficiently comprehensive with respect to matters of nuclear safety to require an inference of preemptive intent.[90] The court agreed that the 1959 amendments to the AEA, which added the provision relied upon by Minnesota, allowed for an expanded role of the states in matters related to nuclear power.[91] Pointing to the federal government's reservation of matters relating to "radiation hazards" in section 274(k), however, the court concluded that the federal government exercised plenary control over matters related to nuclear safety.[92] Upon reviewing the legislative history of section 274(k), the court concluded that, although the 1954 version of the AEA and its 1959 amendments had ceded some authority to the states, the amendments were not meant to allow concurrent jurisdiction over radiation hazards.[93] Because Minnesota's law controlling radioactive emissions directly related to nuclear and radioactive safety, the court held that the law was preempted.[94]

Other courts, both before and after *Northern States,* generally adhered to the distinction between radioactive and nonradioactive safety matters suggested by *Northern States.*[95] In *Pacific Gas and Electric Co. v.*

86. *Northern States,* 447 F.2d at 1148-49 (citing 42 U.S.C. § 2021(k) (1982)).

87. *Id.* at 1149.

88. 42 U.S.C. § 2021(k) (1982).

89. *Northern States,* 447 F.2d at 1149.

90. *Id.* at 1148.

91. *Id.*

92. *Id.* at 1150.

93. *Id.* at 1150-52. As the dissent pointed out, the legislative history is not unequivocal on this point. *Id.* at 1155; *see also* Note, *Jurisdiction—Atomic Energy,* 68 MICH. L. REV. 1294, 1301-06 (1970). Nonetheless, the committee reports referred to by the majority are clear on the point and are generally held to be more persuasive than statements of individuals, such as those upon which the dissent relied. *See, e.g.,* United States v. O'Brien, 391 U.S. 367, 385 (1968).

94. *Northern States,* 447 F.2d at 1154.

95. *See, e.g.,* Commonwealth of Pa. v. General Pub. Util. Corp., 710 F.2d 117, 120 (3d Cir. 1983) (action for private nuisance caused by radioactive hazards preempted by AEA); Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630-32 (9th Cir.

State Energy Resources Conservation & Development Commission,[96] the Supreme Court directly addressed the principles developed in *Northern States* and its progeny. At issue in *Pacific Gas* was the validity of California's Warren-Alquist State Energy Resources Conservation and Development Act.[97] The relevant portion of this law imposed a moratorium on nuclear power plant construction until a state commission found that " 'there exists a demonstrated technology or means for the disposal of high level-nuclear waste.' "[98]

The *Pacific Gas* Court began by analyzing the parameters of the preemption doctrine. First, the Court noted, Congress may preempt state law in express terms.[99] Second, absent express preemption, implied preemption occurs if Congress has regulated pervasively, particularly in areas of strong federal interest, and thus displaced state law from the entire

1982), *cert. denied,* 461 U.S. 913 (1983) (law closing Washington borders to nuclear waste preempted by AEA); Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571, 579-81 (7th Cir. 1982) (action for public nuisance to abate radioactive hazards preempted by AEA); Simmons v. Arkansas Power & Light Co., 655 F.2d 131, 134-35 (8th Cir. 1981) (private litigant cannot force closing of nuclear power plant pending development of emergency plans for reactor accidents); Liesen v. Louisiana Power & Light Co., 636 F.2d 94, 95 (5th Cir. 1981) (private litigant cannot enjoin construction of nuclear power plant by claiming violations of AEA standards); Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 237-39 (3d Cir. 1980), *cert. denied,* 449 U.S. 1096 (1981) (private litigants cannot enjoin reactor operation based on allegations of plans to release radioactive materials into river); United Nuclear Corp. v. Cannon, 553 F. Supp. 1220, 1229-32 (D.R.I. 1982) (state statute requiring posting of bond for twenty years to cover clean-up costs for any radiation hazard preempted by AEA); Northern Cal. Ass'n to Preserve Bodega Head and Harbor, Inc. v. Public Util. Comm'n, 61 Cal. 2d 126, 133, 390 P.2d 200, 204, 37 Cal. Rptr. 432, 436 (1964) (California Public Utilities Commission may consider earthquake safety implications of reactor siting); Commonwealth Edison Co. v. Pollution Control Bd., 5 Ill. App. 3d 800, 801, 284 N.E.2d 342, 342-43 (1972) (state statute imposing safety conditions on reactors preempted by AEA); Marshall v. Consumers Power Co., 65 Mich. App. 237, 247, 237 N.W.2d 266, 274-75 (1975) (action for nuisance based on radioactive hazard preempted, but action based on steam, fogging, and icing not preempted); State *ex rel* Utility Consumers Council v. Public Serv. Comm'n, 562 S.W.2d 688, 698-99 (Mo. Ct. App. 1978). *See generally* Annotation, *State Regulation of Nuclear Power Plants,* 82 A.L.R. 3d 751 (1978 & Supp. 1987) (discussing courts' attempts to distinguish "radiological" from "nonradiological" matters.).

96. 461 U.S. 190 (1983).

97. CAL. PUB. RES. CODE §§ 25000-25986 (West Supp. 1987).

98. *Pacific Gas,* 461 U.S. at 198 (quoting CAL. PUB. RES. CODE § 25524.2(a), (c) (West 1977)). Also appealed was the district court's holding that the AEA preempts Public Resource Code section 25524.1(b), which imposes a moratorium on plant construction until the state commission determines that there exists adequate interim storage for spent fuel rods. Both the Ninth Circuit and the Supreme Court concluded that the issue was not ripe for review and declined to reach a holding on the merits. *Pacific Gas,* 461 U.S. at 199, 203; Pacific Legal Found. v. State Energy Resources, 659 F.2d 903, 916 (9th Cir. 1981).

99. *Pacific Gas,* 461 U.S. at 203 (citing Jones v. Roth Packing Co., 430 U.S. 519, 525 (1977)).

field.[100] Third, federal law preempts when it "actually conflicts" with state law.[101] That is, state law is preempted when compliance with both state and federal standards "is a physical impossibility,"[102] or when state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[103]

Because the AEA does not contain any express statement of preemption, the Court began with the second branch of the doctrine: implied preemption through pervasive regulation.[104] The Court initially noted that although the AEA is broad in its regulation of nuclear power plants, it is not all-encompassing, and substantial room exists for state regulation of nuclear power.[105] The Court pointed to two provisions relegating some authority to the states. First, section 271 of the AEA provides that "[n]othing in this chapter shall be construed to affect the authority . . . of any Federal, State or local agency with respect to the generation, sale or transmission of electrical power produced through the use of nuclear facilities . . . ."[106] The Court observed that the statutory language and history of this section confirmed that while "the safety of nuclear technology was the exclusive business of the federal government, state power over the production of electricity was not otherwise displaced."[107]

The second provision conferring authority upon the states was section 274(k) of the AEA, upon which the *Northern States* court relied heavily. The Court found it necessary to examine the history of the 1959 AEA amendments that added section 274(k).[108] The Court concluded that section 274(k) was not an affirmative grant of power to the states; rather, Congress added section 274(k) to make clear that the 1959 amendments had not drawn any more authority from the states than the

100. *Id.* at 204 (citing Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)).

101. *Id.*

102. *Id.* (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

103. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). This synopsis of preemption doctrine is similar to summaries offered by other courts and commentators. *See, e.g.*, Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571, 579 (7th Cir. 1982); *Northern States*, 447 F.2d at 1146; Rothschild, *supra* note 84, at 848-54. *See generally* Note, *Federal Preemption:* Illinois v. City of Milwaukee, 60 TUL. L. REV. 407 (1985) (authored by John William Hite, III) (discussing preemptive effect of Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986)).

104. *Pacific Gas*, 461 U.S. at 205.

105. *Id.*

106. *Id.* at 208.

107. *Id.*

108. *Id.* at 210.

original act passed in 1946, as amended in 1954.[109] In so doing, Congress "underscored the distinction drawn in 1954" between regulation of nuclear power plants for safety reasons, and elemental decisions of state governments as to whether nuclear power plants are desirable from other perspectives.[110]

Based upon this interpretation of the AEA, the Court decided that the Act did not preempt the California statute because its conditional moratorium on construction was based on economic, not safety, concerns.[111] The Court noted that much of the official analysis of the bill cited economic goals and avowed an economic purpose for the legislation.[112] While acknowledging that some legislators may have voted for the bill for safety reasons, the Court reasoned that official statements are a more satisfactory guide to determining legislative intent than psychoanalysis of each legislator.[113] The Court thus held that the California statute did not fall within the occupied zone of nuclear safety regulation and that it was not preempted under the implied preemption doctrine.[114]

The *Pacific Gas* Court also considered whether the California statute actually conflicted with the AEA by frustrating the purpose of the Act, thus necessitating a holding of preemption under the third branch of the preemption doctrine.[115] The Court noted that while a basic purpose of the AEA is to promote nuclear power,[116] the objective of promoting nuclear power is to be achieved economically.[117] Concluding that the California statute, construed as a guarantor of economically viable nuclear development, was not at cross-purposes with the AEA, the Court ruled that the California Warren-Alquist Act was outside the range of the AEA's preemptive force.[118]

The final link in the chain of AEA preemption cases was *Silkwood v. Kerr-McGee Corp.*[119] In *Silkwood,* the administrator of Karen Silk-

109. *Id.*
110. *Id.*
111. *Id.* at 214-17.
112. *Id.* at 214.
113. *Id.* at 216; *see also* R. DWORKIN, A MATTER OF PRINCIPLE ch. 5 (1986) (arguing that absent evidence of a common psychological motivation among a majority of legislators voting for a bill, the only guide to legislative intent is committee reports and other "official" statements of legislative purpose).
114. *Pacific Gas,* 461 U.S. at 216.
115. *Id.* at 220. The Court also considered, and rejected, the argument that various Nuclear Regulatory Commission regulations of waste disposal preempted the statute. *Id.* at 217-20.
116. *Id.* at 217-21.
117. *Id.* at 222.
118. *Id.*
119. 464 U.S. 238 (1984).

wood's estate brought a diversity action against Kerr-McGee, seeking relief under various Oklahoma common-law theories.[120] Silkwood was employed as a laboratory analyst at Kerr-McGee's nuclear fuel pins fabrication plant,[121] which was subject to safety regulation under the AEA.[122] Silkwood's administrator claimed that Kerr-McGee tortiously contaminated Silkwood with plutonium. The jury agreed and returned a verdict of $5,000 in compensatory damages for injury to Silkwood's property, $500,000 in compensatory damages for personal injuries, and $10 million in punitive damages.[123] The Tenth Circuit reversed the award of compensatory damages for personal injury, holding that it was barred by the exclusive remedy of Oklahoma's workers' compensation statute; it also reversed the award of punitive damages, holding that the AEA preempted the award.[124]

On review, the Supreme Court evaluated only the propriety of the punitive damages award. The Court began by considering whether the punitive damages award fell within the AEA-occupied field of nuclear safety, and was therefore preempted. The Court noted that the award of punitive damages was a punishment for failing to conform to state-mandated standards of nuclear safety.[125] Under the standards announced in *Pacific Gas,* therefore, the AEA ordinarily would preempt the punitive damages award.[126]

The Court decided, however, that specific features of the AEA required the opposite result. The majority observed that Congress had passed the Price-Anderson Act[127] to limit liability for state law claims against certain licensees of nuclear technology under the AEA for injuries relating to "nuclear incidents."[128] The Court reasoned that this limitation would be unnecessary if the AEA displaced usually available state tort law remedies.[129] Upon review of the legislative history, the majority noted that Congress drafted the Price-Anderson Act under the assumption that plaintiffs would have access to the traditional range of tort remedies for contamination arising out of a nuclear incident.[130] The Court

120. *Id.* at 243.
121. *Id.* at 241.
122. *Id.*
123. *Id.* at 245.
124. Kerr-McGee Corp. v. Silkwood, 667 F.2d 908, 923 (10th Cir. 1981), *rev'd. in part,* 464 U.S. 238 (1984).
125. 464 U.S. at 250-51.
126. *Id.*
127. *Id.* at 251.
128. *Id.* (citing 42 U.S.C. § 2210 (1982)).
129. *Id.* at 252.
130. *Id.* at 252-54.

thus concluded that the AEA did not displace tort law remedies traditionally available to private parties to redress personal and property injuries.[131]

In finding that Silkwood could recover damages for a nuclear incident, the majority rejected Kerr-McGee's argument, endorsed by both dissents, that punitive damages were inconsistent with the AEA.[132] The Court noted that "[p]unitive damages have long been part of traditional state tort law."[133] The *Silkwood* majority remained convinced that punitive damages were appropriate because the AEA did not displace state tort law; state remedies therefore applied "with full force."[134]

The *Silkwood* Court also considered the appropriateness of punitive damages under the "actual conflict" branch of preemption analysis. The majority observed that there is no "physical impossibility" of paying punitive damage awards and complying with the AEA.[135] After briefly restating *Pacific Gas'* analysis, the Court concluded that punitive damages awards do not frustrate any of the purposes of the AEA because the Act does not require promotion of nuclear energy " 'at all costs.' "[136] The Court thus reversed the Tenth Circuit's holding and reinstated Silkwood's punitive damages award.

Although lower courts have endeavored to find a precise doctrine for preemption under the AEA,[137] none has emerged.[138] For instance, under *Pacific Gas,* a moratorium motivated by safety concerns apparently is preempted; however, a moratorium couched in economic terms, but identical in effect, is not.[139] Under *Silkwood* and *Northern States,* a

131. *Id.* at 256.

132. *Id.* at 255; *id.* at 260-66 (Blackmun, J., dissenting); *id.* at 272 (Powell, J., dissenting).

133. *Id.* at 255.

134. *Id.*

135. *Id.* at 257.

136. *Id.* (quoting *Pacific Gas,* 461 U.S. at 222).

137. *See, e.g.,* Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103, 1110-13 (3d Cir. 1985), *cert. denied,* 475 U.S. 1013 (1986) (local ordinance forbidding transportation of nuclear waste within township preempted by the AEA); County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 62-63 (2d Cir. 1984) (action by county on behalf of residents against utility claiming breach of contract and warranty for misdesign of nuclear power plant preempted by the AEA); Citizens for Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp. 1084, 1094-96 (E.D.N.Y. 1985) (county ordinance declaring impossibility of designing an adequate evacuation plan for county residents not preempted by AEA).

138. *See, e.g.,* Huber, *Electricity and the Environment: In Search of Regulatory Authority,* 100 HARV. L. REV. 1002, 1030-32 (1987) (criticizing *Pacific Gas* and *Silkwood* as leaving the issue of AEA preemption in "considerable confusion").

139. It is extremely unlikely that this question ever will be litigated. States wishing to impose a moratorium will be careful to document the economic justifications in committee reports and the statutes themselves, regardless of the actual motivations of the legislators supporting the bill.

penalty payable to a private individual for violating state common-law standards of nuclear safety is not preempted; however, a penalty payable to the state for violating state statutory standards of nuclear safety is preempted.[140] Nevertheless, the cases make at least one matter clear: the original 1946 legislation exercised plenary control over nuclear technology. Any nonpreemption decision must find its rationale in subsequent legislation amending the AEA.[141] In *Pacific Gas* it was the 1954 Act and its 1959 amendments; in *Silkwood* it was the Price-Anderson Act, added to the AEA in 1957 and amended in 1965.

B. Preemption of Regulation of Nuclear Weapons Production

The preceding discussion sheds only indirect light on the question whether the AEA preempts ordinances prohibiting local governments from contracting with producers of nuclear *weapons,* as distinguished from producers of nuclear power, which were the subjects of regulation in the cases discussed above. Although the AEA treats nuclear weapons production and nuclear power production similarly in some respects, it treats them quite differently in others.[142]

As an initial matter, the AEA regulates nuclear weapons production at least as comprehensively as nuclear power production. The licensing requirements, for instance, apply whether the nuclear technology relates to the development of power or weapons,[143] and domestic sales restrictions on nuclear material apply to material used in both weapons and power production.[144] Further, although the AEA expressly promotes

140. *See Silkwood,* 464 U.S. at 256; *Northern States,* 447 F.2d at 1154.

141. *See, e.g., Silkwood,* 464 U.S. at 251-56; *Pacific Gas,* 461 U.S. at 207-12.

142. The only case to consider AEA preemption in the context of nuclear weapons production is McKay v. United States, 703 F.2d 464, 467-69 (10th Cir. 1983). In *McKay,* landowners near the Rocky Flats nuclear weapons production facility brought an action for damage to their land for alleged radioactive seepage. At the time that *McKay* was decided, the Supreme Court had decided *Pacific Gas,* and a different panel of the Tenth Circuit had issued its opinion in *Silkwood.* Relying on its own opinion in *Silkwood,* the *McKay* court held that the action was not preempted. *Id.* at 469. As this part of the Article demonstrates, simple application of the nuclear power cases in the weapons context is not a sufficient analytical framework. Nonetheless, the result in *McKay* is correct in light of the subsequent Supreme Court decision in *Silkwood.* The Price-Anderson Act applies to all nuclear occurrences. Therefore, its tort law rationale should apply to both power and weapons producers. Because new breed ordinances obviously do not fit within this "tort law" exception to preemption, as discussed below, the analysis is necessarily different. One commentary reads *McKay* to stand for the proposition that nuclear weapons and power producers must receive identical treatment under the AEA. *See* Weaver, *supra* note 22, at 570-71. This view misreads *McKay,* which can be rationalized under the tort law exception, and ignores the important distinctions in the AEA between weapons and power production.

143. 42 U.S.C. §§ 2133, 2134 (1982).

144. *Id.* § 2073.

nuclear power, the Act invokes "common defense" or other military-related goals several times in reciting the general purpose of the Act.[145]

The Act's central distinction between nuclear power and weapons production, however, is its radically different treatment of the end-product of each. As the Court noted in *Pacific Gas,* the AEA allows states a substantial voice in matters concerning electricity, the end-product of nuclear power plants.[146] Subchapter VIII of the AEA (which deals with military applications), however, makes the federal government the sole source of control with regard to nuclear weapons.[147] Section 2121(a) of Title 42 gives the Nuclear Regulatory Commission (formerly the Atomic Energy Commission) sole authority to do research and development work[148] and to direct production of nuclear weapons, under the guidance of the President.[149] Section 2122 expressly makes it unlawful for any person to produce or possess a nuclear weapon.[150]

The provisions in subchapter VIII were part of the original 1946 legislation, and the relevant legislative history confirms the intent to maintain nuclear weapons production within the control of the federal government.[151] Senate Report 1211 of 1946 stressed the need for "an absolute Government monopoly of production of fissionable materials."[152] In support of the need for this monopoly, the report noted that such "material is the principal ingredient of the atomic bomb" and that "to permit private manufacture of fissionable material would be to permit private manufacture of enormous destructive potentialities."[153] The report noted the Commission's role as "the exclusive producer of atomic weapons."[154] Finally, noting the President's role, the report stated that "[i]n view of [their] enormous military significance, atomic weapons are subject, under the bill, to full control by the President as Commander in Chief. All determinations as to production rates, custody and transfers are to be made by him."[155]

145. *See, e.g., id.* §§ 2011(a), 2012(g), 2013(c), 2017(d).

146. Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 208-17 (1983).

147. 42 U.S.C. §§ 2121-2122 (1982).

148. *Id.* § 2121(a)(1); *see id.* § 2122.

149. *Id.* § 2121(a)(2); *see id.* § 2122.

150. *Id.* § 2122.

151. S. REP. NO. 1211, 79th Cong., 2d Sess., *reprinted in* 1946 U.S. CODE CONG. SERV. 1327, 1330.

152. *Id.*

153. *Id.*

154. *Id.* at 19, *reprinted in* 1946 U.S. CODE CONG. & ADMIN. NEWS at 1332.

155. *Id.*

Subchapter VIII has remained largely unchanged. Thus, unlike the conscious effort to relax the "absolute Government monopoly" with regard to nuclear power production, the federal government has not relaxed its grip on nuclear weapons production. This is not surprising, as concerns about private nuclear weapons production are even more justified today than in 1946. Further, whereas the states in *Pacific Gas*[156] and *Silkwood*[157] had a traditional area of authority to recapture, no such authority exists with regard to nuclear weapons production, and there is no specific statute returning a portion of the authority over nuclear weapons production to the states. Therefore, the AEA completely occupies the field of the regulation of nuclear weapons production.

Under the "displacement" theory of preemption,[158] the AEA preempts new breed nuclear free zone ordinances if they regulate nuclear weapons production and therefore fall within the AEA-occupied field. The issue of preemption becomes a question of whether the noncontracting provisions constitute a regulation of nuclear weapons production. Paradigmatic examples of "regulations" of conduct for purposes of AEA preemption analysis include laws expressly forbidding such conduct under threat of civil or criminal sanction[159] or conditioning government permission for conduct upon the fulfillment of specified prerequisites, such as obtaining a permit.[160] For instance, the Minnesota law evaluated in *Northern States* plainly constituted a regulation of the production of nuclear power because the statute prohibited the operation of a nuclear power plant unless the plant met specified safety standards.[161]

Pacific Gas and *Silkwood* both suggest that "regulation" for purposes of AEA preemption analysis extends beyond such core examples. In *Pacific Gas,* the Court reasoned that regulation depends in part upon legislative motive.[162] In *Silkwood,* the court noted that an economic penalty for specified conduct is regulation of that conduct for AEA preemption purposes.[163] These threads in the fabric of AEA preemption doctrine suggest that an ordinance constitutes regulation of conduct for purposes of the AEA if the law or ordinance is enacted for the purpose of

156. Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 208 (1983) (electric power).

157. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 238 (1984) (tort law).

158. *See supra* notes 100, 104-10 and accompanying text.

159. *See, e.g.,* Liesen v. Louisiana Power & Light Co., 636 F.2d 94, 95 (5th Cir. 1981) (civil injunction of nuclear power plant construction constitutes regulation of nuclear power for purposes of AEA).

160. *See, e.g., Northern States,* 447 F.2d at 1149.

161. *See supra* notes 85-94 and accompanying text.

162. *See supra* notes 108-14 and accompanying text.

163. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984).

influencing that conduct and achieves that influence with a penalty.[164] Thus, the noncontracting provisions of new breed ordinances plainly constitute regulation of nuclear weapons production since the express and obvious goal is to encourage producers to "abandon their work on nuclear weapons."[165] The ordinances influence nuclear weapons production by imposing a penalty on any entity engaging in production. Contracts with local governments provide an economic benefit to the contracting parties; the deprivation of this economic benefit, which would be available but for the entity's decision to engage in weapons production, penalizes nuclear weapons production. Noncontracting provisions of nuclear free zone ordinances thus constitute regulation of nuclear weapons production and are preempted by the AEA.[166]

III. Conflict with the Federal Military and Foreign Affairs Powers

The supremacy clause, which is the source of the AEA's preemptive effect, does not present the only constitutional obstacle to new breed ordinances; the ordinances also conflict with the federal government's role

164. Although these requirements of regulatory "purpose" and "effect" are plainly *sufficient* to constitute regulation, it is doubtful that both requirements are *necessary* for regulation. As the Supreme Court recently noted in dicta, even laws with incidental and indirect effects on the conduct can constitute regulation of that conduct. *See* Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704, 1712 (1988). As the Court noted, Congress has the power to preempt such indirect regulation if it chooses, although in *Goodyear* the majority concluded that Congress had specifically endorsed the regulation. *Id.* In the nuclear power production field, Congress specifically endorsed certain types of indirect regulation. *Id.* Congress, however, provided no parallel endorsements in the nuclear weapons field. Therefore, even if the noncontracting provisions constitute "indirect" regulation of nuclear weapons production, application of this analytical framework leads to the conclusion that the noncontracting provisions are preempted.

165. MARIN COUNTY, CAL., CODE, ch. 23.12, preamble (1988); Hayward, Cal., Ordinance 87-024, § 3(f) (Sept. 15, 1987).

166. The prohibitions on contracting with nuclear weapons producers are, in all likelihood, also in "actual conflict" with the AEA. This actual conflict branch of preemption has two divisions: "physical impossibility" and "frustration of purpose." *Pacific Gas,* 461 U.S. at 204. There is plainly no impossibility of complying with both local and federal law; however, the ordinances probably frustrate a federal purpose. As the 1946 legislation history made clear, the primary goal was to maintain the federal government as the sole regulator of nuclear weapons production. The ordinances clearly stand in the path of this goal and are, therefore, preempted.

The frustration of purpose rubric has been criticized as "abstract." *See* Rothschild, *supra* note 84, at 852-54. The continued vitality of this standard, however, is unquestionable in the wake of *Pacific Gas* and *Silkwood.* A more appropriate criticism is that it is redundant of the "displacement" theory. Displacement theory is a search for congressional intent; frustration theory is a search for congressional purpose. The similarity of these quests probably explains the extremely brief treatment given to the frustration theory in *Pacific Gas* and *Silkwood. See Pacific Gas,* 461 U.S. at 220-22; *Silkwood,* 464 U.S. at 257.

as the exclusive regulator of military and foreign affairs. Against the backdrop of divisive state action brought about by the Articles of Confederation, Alexander Hamilton argued that the new Constitution would promote "the common defense of the members; the preservation of public peace, as well against internal convulsions as external acts; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries."[167] The Constitution achieved these goals by vesting in the federal government the prescribed authorities, including the foreign and military affairs powers.[168] Although the Constitution frames the provisions concerning military and foreign affairs as affirmative grants of power to the federal government, judicial interpretation has established that the provisions have a "dormant" side that precludes some measure of state action in both fields.[169] Although the exclusivity of federal authority over military affairs and foreign affairs are distinct doctrines, each one serves the same goal of ensuring that the United States can act as a coherent unit in the international arena. The new breed ordinances interfere with this ability and thus conflict with both of these doctrines.

A. Military Affairs

The United States Supreme Court outlined the zone of exclusive federal authority over military affairs more than a century ago. In *Tarble's Case,*[170] the father of an enlisted soldier sought a writ of habeas corpus from a Wisconsin state court commissioner. The father maintained that a recruiting officer had the son in custody and had mustered the son into the army before his eighteenth birthday.[171] The court commissioner issued the writ, and the Wisconsin Supreme Court affirmed.[172]

The United States Supreme Court reversed, holding that this issuance of a writ was unconstitutional.[173] The Court noted that "the National government" had the "plenary and exclusive" power to " 'raise and support armies' " and "to provide for the government and regulation

167. THE FEDERALIST No. 23, at 153 (A. Hamilton) (C. Rossiter ed. 1961). The twenty-third paper is not the only one to deal with this subject. Several other papers discuss the advantages of centralizing the government military and foreign relations functions. *See, e.g., id.* Nos. 24-29, 41-42.

168. U.S. CONST. art. I, § 8, cl. 11-16; *id.* art. II, § 2.

169. *See, e.g.,* United States v. Pink, 315 U.S. 203, 230-31 (1941) (states may not interfere with foreign relations); Tarble's Case, 80 U.S. 397, 408 (1871) (states may not interfere with military affairs).

170. 80 U.S. 397, 398 (1871).

171. *Id.*

172. *Id.* at 400.

173. *Id.* at 411-12.

of the land and naval forces."[174] The Court further reasoned that "[n]o interference with the execution of this power of the National government in the formation, organization, and government of its armies" could be permitted "without greatly impairing [or] destroy[ing], this branch of public service."[175] The Court noted that officers would be "subjected to constant annoyance and embarrassment" if their decisions were constantly scrutinized by the courts.[176] The chaos resulting from the scenario of independent city, county, and state inquiries into the propriety of military decisions conflicted with the constitutional mandate of a centralized military.[177]

Tarble remains the authoritative Supreme Court pronouncement on constitutional protection for military affairs,[178] and its principle was applied recently in an instructive opinion of the Appellate Division of New York. In *Fossella v. Dinkins,*[179] the court considered a proposed New York City ordinance that effectively would have forbidden the city from selling or leasing any property for use as a military base at which nuclear weapons were to be sited.

The court, following *Tarble,* held the ordinance unconstitutional,[180] rejecting the argument that local concerns allow a local government to prevent deployment of nuclear weapons within its borders.[181] Such an ordinance, the court reasoned, would drastically interfere with military functions and violate the *Tarble* principle.[182] The court concluded that

> if every local government were given the power to restrict the estab-

174. *Id.* at 408 (quoting U.S. CONST. art. I, § 8, cl. 12, 14).

175. *Id.*

176. *Id.*

177. *See id.* at 408-09. Federal courts also have been extremely reluctant to allow federal law intrusions into the realm of military affairs. Most notable in this respect is the *Feres* doctrine, which precludes claims under the Federal Tort Claims Act for discretionary military decisions. *See* Feres v. United States, 340 U.S. 135, 146 (1950); Bynum v. FMC Corp., 770 F.2d 556, 574-77 (5th Cir. 1985) (federal common law does not allow servicemen to claim product liability for design defect in military hardware if designed according to government specifications).

178. *Tarble* is important for its teaching on the general authority of state courts to order the release of federal prisoners. In fact, Justice Field framed the issued in *Tarble* two ways: one in terms of state authority to control the military, the other in terms of general state authority to order the release of federal prisoners. *Tarble,* 80 U.S. at 402. The importance of this more general lesson of *Tarble* has been noted by other commentators. *See, e.g.,* Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review of a New Synthesis,* 124 U. PA. L. REV. 45, 93 (1975). Nonetheless, *Tarble* is equally important for its discussion of the exclusivity of federal power over military affairs.

179. 110 A.D.2d 227, 229, 494 N.Y.S.2d 878, 880 (1985).

180. *Id.* at 231, 494 N.Y.S.2d at 881.

181. *Id.* at 229-30, 494 N.Y.S.2d at 880.

182. *Id.*

> lishment and operation of Federal military installations or weaponry located within its geographical jurisdiction, the power of the Federal Government to raise and maintain an army or navy would, as warned by the United States Supreme Court in *Tarble's Case,* be destroyed.[183]

The court also rejected the city's argument that the ordinance was protected noncooperation with the military, rather than unprotected obstruction.[184] The court perceived no constitutionally significant distinction between the two[185] and noted that, although a military installation might be able to operate independent of municipal services, such operation would impair efficiency. Thus, the city exceeded its constitutional authority in imposing this condition.[186]

Two major lessons emerge from *Tarble* and *Fossella.* First, the relevant effects on the military are those that result if the practice in question is adopted universally.[187] Thus, the fact that only a relatively few jurisdictions have adopted new breed ordinances is irrelevant to the constitutional analysis because the issue is whether universal adoption would impair the military. New breed ordinances attempt to place sufficient economic pressure on producers to force them "to abandon their work on nuclear weapons."[188] The universal adoption of new breed ordinances could thus affect the availability of weapons to the national military. This would impair the efficient achievement of an express military goal of the federal government.

Second, the effect on weapons availability need not cripple military operations. Even if the new breed ordinances did impair the production of nuclear weaponry, existing nuclear and conventional weaponry still would exist. Under *Tarble* and *Fossella,* however, the effect on the military need not be devastating, merely perceptible.[189] Because the new breed ordinances are an impediment to the efficient operation of a military goal set by the federal government, they cannot survive constitutional review.[190]

---

183. *Id.* at 230, 494 N.Y.S.2d at 880 (citation omitted).

184. *Id.,* 494 N.Y.S.2d at 880-881.

185. *Id.* at 230-231, 494 N.Y.S.2d at 881.

186. *Id.*

187. *See supra* notes 177, 183 and accompanying text.

188. *See, e.g.,* MARIN COUNTY, CAL., CODE ch. 23-12, preamble (Nov. 4, 1986); Hayward, Cal., Ordinance 87-024, § 3(f) (Sept. 15, 1987).

189. *See Tarble,* 80 U.S. at 408; *Fossella,* 110 A.D.2d at 231, 494 N.Y.S.2d at 881.

190. One commentary concludes that the Chicago nuclear free zone ordinance, which does not include a noncontracting provision, does not interfere with the federal military relations power. *See* Weaver, *supra* note 22, at 574-75. This commentary relied on the decision in Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 281 (1943), to support this conclusion. The purpose of this Article is to evaluate the legality of the noncontracting provisions common to new breed ordinances, and because Chicago's ordinance does not contain such a provision, no

B. Foreign Affairs

Just as for military affairs, the Constitution maintains a jealous hold on foreign affairs for the federal government. In *Zschernig v. Miller,*[191] the United States Supreme Court considered the constitutionality of an Oregon statute restricting the descent of property to foreign nationals. The statute in question allowed payment to foreign heirs only if (1) the foreign nation gave a reciprocal right to American citizens to take property from foreign relatives, (2) the reciprocal payments were made in the United States, and (3) the foreign heirs were able to receive the property "without confiscation."[192] The Oregon courts upheld the statute.[193]

In an opinion by Justice Douglas, the Supreme Court reversed and held that the statute was an unconstitutional intrusion into the exclusive authority of the federal government to regulate foreign affairs.[194] The Court observed that the statute required a normative evaluation of the legal system of the relevant foreign country.[195] According to the Court, the requirement that the foreign country not impose confiscatory requirements on the foreign heir was an effort to judge the foreign country by the American values encapsulated in the just compensation clause of the fifth amendment.[196] The Court also criticized the Oregon courts for deciding cases under the statute on the grounds of "foreign policy attitudes, [such as] the freezing or thawing of the 'cold war' "[197] and held the

definite opinion on the validity of any of its provisions will be offered. Arguably, provisions other than noncontracting provisions might run afoul of the dormant military relations powers. Unlike the noncontracting provisions, however, many other provisions are unlikely to create a justiciable case or controversy. In any event, *Penn Dairies* sheds little light on the question of whether the new breed ordinances can survive constitutional review. *Penn Dairies* considered whether a Pennsylvania law regulating milk prices could apply to a contract between a private milk producer and the federal government to supply milk to a military base. *Id.* at 266. The Supreme Court concluded that the state law could be enforced, relying on the fact that the law applied to all purchasers, including the federal government, and thus was one of "the normal incidents of the operation within the same territory of a dual system of government . . . ." *Id.* at 271. *Penn Dairies* did not discuss *Tarble,* and it purported only to deal with states' ability to regulate affairs of the federal government generally. Because new breed ordinances affect an activity carried out solely to serve federal military goals, such ordinances cannot come within the "normal incidents" rationale of *Penn Dairies.* Therefore, cases such as *Tarble* and *Fossella,* which deal with efforts to affect military policy, speak more directly to the issue.

191. 389 U.S. 429, 430-431 (1968).
192. *Id.*
193. *Id.* at 431.
194. *Id.* at 441.
195. *Id.* at 440.
196. *Id.* at 435.
197. *Id.* at 437.

statute unconstitutional because it "affected international relations in a persistent and subtle way."[198]

The *Zschernig* Court expressly declined to overrule *Clark v. Allen*[199]—also authored by Justice Douglas—in which the Court refused to strike down a California statute conditioning the inheritance by foreign nationals upon the availability of a reciprocal right to United States citizens.[200] *Zschernig* distinguished *Clark* in two ways. First, *Clark* involved a simple reciprocity provision, not the requirement of a nonconfiscatory legal system.[201] According to the Court, this simpler and less judgmental statutory scheme did not invite the same criticism of foreign systems as the Oregon statute at issue in *Zschernig*.[202] Second, the *Zschernig* statute was accompanied by a long history of interpretation that the Court found offensive, while the Court had considered the *Clark* statute only on its face.[203]

Justice Harlan, concurring in the result, argued that the *Zschernig* majority opinion was irreconcilable with *Clark*.[204] A fairer reading of the two decisions, however, reveals a narrow, but navigable, channel.[205] Whether a statute or ordinance intrudes on the foreign affairs power is a matter of degree. If the statute evinces or entails necessary criticism of the policies of foreign nations, it oversteps the bounds of permissible state authority. If, however, it simply requires a nonjudgmental construction of foreign standards, it is permissible.[206]

These principles have been most recently applied in two areas. The first is the so-called "Buy-American" statutes. In *R.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission of the State of New Jersey,*[207] the New Jersey Supreme Court concluded that the New Jersey Buy-American statute was constitutional because a requirement that the state purchase American goods, when available, did not entail

198. *Id.* at 440.

199. *Id.* at 432; Clark v. Allen, 331 U.S. 503 (1947).

200. *Clark,* 331 U.S. at 517-18.

201. *Zschernig,* 389 U.S. at 432-33.

202. *Id.* at 434.

203. *Id.* at 432-33.

204. *Id.* at 445 (Harlan, J., concurring).

205. *See* Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation,* 61 TUL. L. REV. 469, 513-14 (1987) (discussing lower court decisions in the wake of *Zschernig* and *Clark*).

206. *See id.* at 513-15; *see also In re* Estate of Kish, 52 N.J. 454, 466, 246 A.2d 1, 8 (1968) (striking down New Jersey foreign inheritance statute); *In re* Estate of Leikind, 22 N.Y.2d 346, 352, 239 N.E.2d 550, 553, 292 N.Y.S.2d 681, 685-86 (1968) (upholding New York foreign inheritance statute); First Nat'l Bank v. Fishman, 16 Ohio Misc. 185, 195-96 (1968) (invalidating Ohio foreign inheritance statute).

207. 75 N.J. 272, 291-92, 381 A.2d 774, 783-84 (1977)

any criticism of foreign governments.[208] In *Bethlehem Steel Corp. v. Board of Commissioners,*[209] however, a California court of appeals struck down a similar statute on the grounds that it offered "great potential for disruption" with established trade policies of the federal government and thus exceeded state authority. Commentators, like the two courts above, also disagree on the constitutionality of these statutes.[210]

The foreign affairs power also is prominent in the context of South African divestment laws, which require local and state governments to sell their investments in companies doing business in South Africa.[211] The reported decisions suggest that these ordinances and statutes are inherently critical of South African policies and thus beyond state authority under the doctrine announced in *Zschernig.*[212] At least one commentator, however, has argued that divestment laws are constitutional, pointing to justifications unrelated to foreign relations.[213] Other commentators argue that these factors cannot overcome the criticism of South Africa inherent in the divestment laws.[214]

Whether new breed ordinances encroach upon the foreign affairs power, however, does not depend directly on the outcome of the debate over the constitutionality of either the Buy-American or South African divestment laws. The rationale underlying the foreign affairs doctrine is that the federal government must have the ability to conduct itself in a

208. *Id. See generally* Kenworthy, *The Constitutionality of State Buy-American Laws,* 50 UMKC L. REV. 1, 20 (1981) (statutes are constitutional); Note, *State Buy American Laws—Invalidity of State Attempts to Favor American Producers,* 64 MINN. L. REV. 389, 412 (1980) (statutes are unconstitutional); Note, *California's Buy-American Policy: Conflict with GATT and the Constitution,* 17 STAN. L. REV. 119, 132 (1964) (authored by H. Usher) (same); Note, *Constitutionality of Buy American Acts Under the Commerce and Supremacy Clauses,* 8 VA. J. INT'L L. 151, 155-56 (1967) (authored by D. Zachary) (same); Comment, *In-State Preferences in Public Contracting: States' Rights Versus Economic Sectionalism,* 49 U. COLO. L. REV. 205, 227 (1978) (authored by D. Jordan) (same).

209. 276 Cal. App. 2d 221, 228-29, 80 Cal. Rptr. 800, 805 (1968) (quoting *Zschernig,* 389 U.S. at 434-435).

210. *See supra* note 205.

211. *See* Lewis, *supra* note 205, at 471-75.

212. *See, e.g.,* Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill. 2d 221, 231-38, 503 N.E.2d 300, 304-08 (1986) (state statute singling out South Africa for unfavorable treatment unconstitutional); New York Times Co. v. City of N.Y. Comm'n on Human Rights, 41 N.Y.2d 345, 349-53, 361 N.E.2d 963, 966-69 (1977) (state commission ruling that newspaper violated state statute by publishing advertisements of employment opportunities in South Africa beyond state authority). *But see* The New Abolitionist, Oct. 1987, at 3, col. 1 (discussing Maryland trial court ruling upholding Baltimore's divestment ordinance) (on file at *The Hastings Law Journal*).

213. *See* Lewis, *supra* note 205.

214. *See, e.g.,* Note, *State and Local Anti-South Africa Action as on Intrusion upon the Federal Power in Foreign Affairs,* 72 VA. L. REV. 813 (1986) (authored by Peter J. Spiro).

unified manner in the international arena.[215] Both the Buy-American laws and the divestment laws are more removed from this concern than the new breed ordinances. If the Buy-American laws are unconstitutional on foreign relations grounds, it is because of their oblique criticism of foreign trading practices. This may raise the specter of a federal government less critical of foreign governments than its constituent parts. If the divestment laws are unconstitutional, it is because they imply criticism of South Africa that is more fierce than that directed by the federal government.[216] The possibility that either of these laws will undercut United States foreign policy seemingly depends upon how foreign countries view them.

New breed ordinances, however, attempt to undo a link that has been established, for better or worse, in American foreign policy: a commitment to an effective nuclear arsenal. This practical effort to counteract a national foreign policy goal directly affects the ability to adhere to a unified policy; divestment and Buy-American laws present, at most, an indirect threat. New breed ordinances go beyond the bounds of state and local authority to act in the area of foreign relations and thus are unconstitutional.

Conclusion

The noncontracting provisions of new breed nuclear free zone ordinances are unenforceable for several reasons. In some states, they conflict with statutes requiring local governments to contract with the lowest responsible bidder. Lowest responsible bidder statutes require local governments to contract with the most inexpensive contractor able to perform, not necessarily the most inexpensive contractor that conforms to social value judgments aligned with the local governments. Further, the provisions are preempted by the Atomic Energy Act of 1954. The AEA occupies the field of nuclear weapons production, and new breed ordinances fall within that occupied field because they regulate nuclear weapons production. Finally, these provisions exceed the authority of local and state governments to regulate military and foreign affairs. The con-

215. *See, e.g.*, Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976); Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941); *Springfield,* 115 Ill. 2d at 226, 503 N.E.2d at 305 (United States must speak with "one voice" in its dealings with foreign nations); *see also,* Note, *supra* note 214, at 842-846.

216. At least nominally, the federal government is opposed to South African internal policies. *See, e.g.*, Exec. Order No. 12,532, 3 C.F.R. 387 (1985), *reprinted in* 50 U.S.C. § 1701 at 661-63 (Supp. III 1985); Lyman, U.S. Export Policy Toward South Africa, Dep't St. Bull., May 1983, at 25; Reagan, Rededication to the Cause of Human Rights, *reprinted in* U.S. Dep't of State, Current Policy No. 643, at 2 (Dec. 10, 1984) (condemning apartheid).

stitutional grants of power to the federal government also carry with them implicit limitations on state and local authority to act in this area. Thus, the new breed ordinances are invalid and should be struck down by the courts or the legislature.